

Contractual Retroactivity

Abstract

There are contracts which set down that their effectiveness occurred before their perfection and validity. It prima facie seems that we may call this legal phenomenon as “contractual retroactivity”. However, this topic has not been discussed much yet because there are only seven very short articles devoted to the phenomenon in question. This master thesis has two main aims: 1) to define contractual retroactivity, 2) to demarcate the legal circumstances under which contractual retroactivity is allowable.

A legal definition of contractual retroactivity should consist of the legal aspects of this phenomenon. So, the relevant legal institutes (such as: a contract and contractual consequences in law, a perfection, an effectiveness, a retroactivity etc.) were identified, described and case-law was recapitulated in the first part of this thesis. This approach provided, among others, three main conclusions. A contract can be generally defined as “a multilateral binding legal act”. The function of contractual retroactivity is to determine time applicability of contractual consequences in law. This is achieved through a legal fiction which feign that effectiveness occurred before perfection and validity. Then, many potentially retroactive legal institutes were analysed (such as: a convalidation, an approbation of a contract, a novation, an advance payment etc.), but, to sum this analysis up, only a convalidation is inherently retroactive. On the other hand, it is necessary to name “intentional contractual retroactivity” as a new legal institute because the others have primarily different use.

The first chapter of the second part mentions many retroactive or contractual-retroactive provisions of Czech law. The rest of the chapters examine six reasons for potentially permissibility of contractual retroactivity. This examination may be summarized as follows. Contractual retroactivity is generally allowed because the principle of freedom of a contract is the key principle of private law, but general reasons for invalidity are applicable (e. g.: a violation of law, a fraud, a consumer and a third person protection etc.). However, if there was a factual “contract” or performance before, retroactive obligation is not impossible. Finally, retroactivity of rights in rem was tested. The conclusion is that an ownership and a servitude can be retroactive because they emerge together with effectiveness of a contract and their retroactivity is not impossible.

Key words: **contract; contractual retroactivity; effectiveness**